Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-58

G. GARVIN BROWN, III,
Petitioner,

— v. —

MARK PAUL FELSEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 10, 1978
CERTIORARI GRANTED OCTOBER 30, 1978

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 6, 1976 — Felsen filed petition in bankruptcy in the Bankruptcy Court for the United States District Court for the District of Colorado.

March 30, 1976 — Brown's complaint to determine dischargeability filed.

April 6, 1976 — Bankruptcy Court Order discharging bankrupt Felsen.

May 18, 1976 — Felsen filed answer and affirmative defenses to complaint to determine dischargeability.

September 1, 1976 — Brown's motion to strike Felsen's affirmative defenses filed.

October 7, 1976 — Order entered denying Brown's motion to strike Felsen's affirmative defenses.

November 10, 1976 — Felsen filed motion and memorandum for summary judgment with stipulation regarding agreed record and attachments.

December 13, 1976 — Brown's memorandum with exhibit in opposition to motion for summary judgment filed.

December 16, 1976 — Findings, conclusions and order of the Bankruptcy Court filed granting Felsen's motion for summary judgment and determining debt to be dischargeable.

December 27, 1976 — Brown's notice of appeal to the District Court filed.

January 5, 1977 — Brown's designation of record and statement of issues filed.

October 19, 1977 — Order of the United States District Court for the District of Colorado entered affirming the judgment and order of the Bankruptcy Court.

November 16, 1977 — Brown's notice of appeal to the Court of Appeals for the Tenth Circuit filed.

November 28, 1977 — Brown's designation of record on appeal filed.

January 18, 1978 — Brown's motion to District Court to supplement record with exhibit omitted by Clerk filed.

January 19, 1978 — Order entered by District Court granting Brown's motion to supplement record.

April 14, 1978 — Opinion and Judgment of the Court of Appeals for the Tenth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

In re: MARK PAUL FELSEN ---------- G. GARVIN BROWN, III, Plaintiff, vs. MARK PAUL FELSEN, Bankrupt, Defendant.	Bankruptcy No. 76-B-56 COMPLAINT TO DETERMINE DISCHARGE- ABILITY Filed March 30, 1976

COMES NOW Plaintiff, G. Garvin Brown, III, by and through his attorneys, Dawson, Nagel, Sherman & Howard, and in support of his complaint to determine dischargeability states, alleges and avers as follows:

FIRST CLAIM FOR RELIEF

1. On or about January 22, 1974, Mark Felsen induced G. Garvin Brown, III to execute a guaranty to Jefferson Bank and Trust, guaranteeing all indebtedness of LeMans Motors and Mark Felsen, with a maximum limit of $350,000.00.

2. Said guaranty was induced by false pretenses and representations, among others, that the guaranty was needed solely because of minor cash flow problems with the LeMans Motors business when in fact Mark Felsen had been selling automobiles out of trust, had been making and issuing false documents of title for Ferrari automobiles, and was otherwise in default to Jefferson Bank and Trust.

3. Subsequent to the execution of the guaranty, Mark Felsen and LeMans Motors, Inc. went into default on their obligations to Jefferson Bank and Trust, litigation ensued,

and a judgment against G. Garvin Brown, III in the amount of $298,000.00 was entered in favor of Jefferson Bank and Trust on the guaranty.

4. In order to satisfy said judgment, G. Garvin Brown, III has entered into an agreement with Jefferson Bank and Trust for the time payment of said judgment and to secure said judgment has deposited stock which he owns in the current market value of approximately $320,000.00 with Jefferson Bank and Trust to secure the judgment.

5. The inducement by Mark Felsen of G. Garvin Brown, III to act as the guarantor for debts of Bankrupt Mark Felsen, the entry of a judgment against G. Garvin Brown, III and the surrender of stock to secure payment of that judgment in a value in excess of $320,000.00 constitutes a liability of Mark Felsen for obtaining property by false pretenses or false representations within the meaning of § 17a(2) of the Bankruptcy Act and is not dischargeable.

WHEREFORE, Plaintiff demands judgment against Defendant Mark Felsen that any amount of money owing from Mark Felsen to G. Garvin Brown, III for indemnification on account of payment by G. Garvin Brown, III of obligations of Mark Felsen or LeMans Motors to Jefferson Bank and Trust on the guaranty above identified be determined not dischargeable and that G. Garvin Brown, III have the costs of this action and such other and further relief as the Court deems appropriate.

SECOND CLAIM FOR RELIEF

6. Plaintiff G. Garvin Brown, III hereby incorporates paragraphs 1 through 5 of the First Claim For Relief as if set forth fully herein.

7. The indebtedness amount to Jefferson Bank and Trust of $298,000.00 for which judgment was entered against G. Garvin Brown, III and judgment in favor of G.

Garvin Brown, III on indemnification was entered against Mark Felsen and LeMans Motors, Inc. was a debt created by the willful and malicious conversion of the property of another in that Mark Felsen sold automobiles upon which Jefferson Bank and Trust had a security interest and to which interest G. Garvin Brown, III is subrogated and entitled.

8. The sale of said automobiles was made possible by Mark Felsen's making and issuing false documents of title for said automobiles and the proceeds from said sale were not paid over to Jefferson Bank and Trust, holder of the security interest, but instead were applied by Mark Felsen to some other use.

WHEREFORE, Plaintiff G. Garvin Brown, III demands that the indebtedness owing from Mark Felsen to him on account of the guaranty by him to Jefferson Bank and Trust of the Bankrupt's debts be determined not dischargeable by reason of the Bankrupt's willful and malicious conversion of property securing that obligation to Jefferson Bank and Trust and Plaintiff demands his costs and such other and further relief as the Court deems appropriate.

THIRD CLAIM FOR RELIEF

9. Plaintiff G. Garvin Brown, III hereby incorporates paragraphs 1 through 8 of the First and Second Claims For Relief as if set forth fully herein.

10. Mark Felsen, during the time period complained of, was president of LeMans Motors and his selling automobiles out of trust and retaining the proceeds constituted the creation of liability by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity within the meaning of § 17a(4) of the Bankruptcy Act.

WHEREFORE, Plaintiff G. Garvin Brown, III demands that the liabilities of Mark Felsen to Plaintiff arising because of the guaranty to Jefferson Bank and Trust of the Defendant's obligations be deemed not dischargeable and that Plaintiff have his costs and such other and further relief as the Court deems appropriate.

DAWSON, NAGEL, SHERMAN & HOWARD

By CRAIG A. CHRISTENSEN

Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, CO 80202 (893-2900)

UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

ANSWER OF FELSEN

Filed May 18, 1976

[Caption omitted in printing]

COMES NOW the Bankrupt, Mark Paul Felsen, by his attorneys, and in answer to the Complaint to Determine Dischargeability alleges as follows:

1. Defendant bankrupt denies paragraphs 1, 2 and 5 of the First Claim for Relief; admits paragraph 3 thereof; and as to paragraph 4 has insufficient knowledge as to the truth thereof.

2. Defendant incorporates herein his answers to the first claim as applicable and denies paragraphs 7 and 8 of the Second Claim for Relief.

3. Defendant incorporates herein his answers to the First and Second Claims for Relief as applicable, and denies paragraph 10 of the Third Claim for Relief.

FIRST AFFIRMATIVE DEFENSE

By way of a First Affirmative Defense, defendant alleges that this proceeding was not timely instituted.

SECOND AFFIRMATIVE DEFENSE

By way of a Second Affirmative Defense, defendant alleges that he has been discharged in this proceeding.

THIRD AFFIRMATIVE DEFENSE

By way of a Third Affirmative Defense, defendant alleges that the Civil Action in the District Court of the State of Colorado, City and County of Denver, referred to

in the Complaint, has been finally concluded and determined. The same is res adjudicata and no finding of fraud was contained therein.

WHEREFORE, having fully answered, defendant prays that the Complaint be dismissed and the he recover his costs.

KELLER & DUNIEVITZ

By ALEX STEPHEN KELLER

Alex Stephen Keller, #1236
Attorneys for Bankrupt Defendant
950 - 17th St., #1650
Denver, Colorado 80202
255-3601

Defendant's Address:
2166 15th St.,
Denver, Colorado 80202

[Certificate of service omitted in printing]

UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

FELSEN'S MOTION FOR SUMMARY JUDGMENT WITH ATTACHMENTS

Filed November 10, 1976

[Caption omitted in printing]

COMES NOW the defendant above named, pursuant to Rule 756 of the Bankruptcy Rules, and shows this Court that there is no genuine issue as to any material fact herein and that the defendant is entitled to judgment as a matter of law. The Court is respectfully requested to consider the entire file in this action, including previous pleadings, motions and briefs filed herein, to consider the case of *Raley v. Nicholas,* 510 F 2d 160 (10th Cir., 1975), and the stipulated record of the State Court proceedings hereto attached.

Respectfully submitted,

KELLER, DUNIEVITZ & JOHNSON

By ALEX STEPHEN KELLER

Alex Stephen Keller, #1236
Attorneys for Defendant
950 - 17th St., #1650
Denver, Colorado 80202
255-3601

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

In re MARK PAUL FELSEN	Bankruptcy No. 76-B-56
G. GARVIN BROWN, III, Plaintiff, vs. MARK PAUL FELSEN, Bankrupt, Defendant.	STIPULATION REGARDING AGREED RECORD

IT IS STIPULATED by and between the parties that the attached hereto are true and accurate copies of pleadings between these parties in Civil Action No. 46724 of the District Court of Jefferson County, State of Colorado. A list of said pleadings is as follows:

1. Summons and Complaint.

2. Answer of LeMans Motors, Inc. and Mark Felsen.

3. Answer of G. Garvin Brown, III.

4. Amended Answer of G. Garvin Brown, III.

5. LeMans Motors, Inc. and Mark Felsen's Reply to Cross-Claim.

6. Pre-Trial Statement of G. Garvin Brown, III.

7. Stipulation.

8. Judgment.

Dated this 4th day of November, 1976.

DAWSON, NAGEL, SHERMAN & HOWARD

By CRAIG A. CHRISTENSEN

Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, CO 80202 (893-2900)
Attorneys for G. Garvin Brown, III

KELLER, DUNIEVITZ & JOHNSON

By ALEX STEPHEN KELLER

Alex Stephen Keller
1650 Colorado National Bldg.
Denver, CO 80202
Attorneys for Mark Paul Felsen and
LeMans Motors, Inc.

* * *

[Summons omitted in printing]

* * *

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 46727

Division 3

JEFFERSON BANK & TRUST,
a state bank chartered under the laws of the State of Colorado,
Plaintiff,

v.

LEMANS MOTORS, INC., a Colorado corporation, MARK FELSEN, and G. GARVIN BROWN, III,
Defendants.

COMPLAINT

Plaintiff Jefferson Bank & Trust, by Holland & Hart, its attorneys of record, for a complaint against the above-named defendants states and alleges as follows:

FIRST CLAIM FOR RELIEF

1. Plaintiff Jefferson Bank & Trust is a state bank chartered under the laws of the State of Colorado.

2. Defendant Mark Felsen is a resident of the State of Colorado. Defendant LeMans Motors, Inc. is a corporation organized under the laws of the State of Colorado with its principal place of business in Denver, Colorado. Defendant G. Garvin Brown, III is a resident of the State of California.

3. On or about May 13, 1974 defendant LeMans Motors, Inc. ["LeMans"] executed its promissory note in the amount of $313,171.98 in favor of plaintiff. Said note represented a renewal and consolidation of several smaller notes executed between July of 1973 and April of 1974. A copy of said note is attached hereto as Exhibit 1. Said note is in default and defendant LeMans has failed and refused to honor the demand of plaintiff for payment in full of the principal and accrued interest thereon. Said note provides for recovery by plaintiff of its reasonable attorney's fees, costs, and expenses of re-taking, holding, and disposing of collateral security therefor.

4. On or about June 17, 1974, defendant LeMans executed its promissory note in the amount of $36,404.75 in favor of plaintiff. Said note represented a renewal and consolidation of several smaller notes executed between July of 1973 and April of 1974. A copy of said note is attached hereto as Exhibit 2. Said note is in default and defendant LeMans has failed and refused to honor the demand of plaintiff for the payment in full of the principal and accrued interest thereon. Said note provides for recovery by plaintiff of its reasonable attorney's fees, costs, and expenses of retaking, holding, and disposing of collateral security therefor.

5. On or about October 11, 1974 defendant LeMans executed its promissory note in the amount of $22,523.95 in favor of plaintiff. A copy of said note is attached hereto as Exhibit 3. Said note is in default and defendant LeMans has failed and refused to honor the demand of plaintiff for payment in full of the principal and accrued interest thereon. Said note provides for recovery by plaintiff of its reasonable attorney's fees, costs and expenses of re-taking, holding, and disposing of collateral security therefor.

6. There is presently due and owing to plaintiff from defendant LeMans the amount of $251,347.30 principal, plus $16,656.95 interest through March 28, 1975 on the notes referred to in paragraphs 3 and 4 above. Said notes accrue interest at the rate of $89.52 per day from and after March 28, 1975.

7. There is presently due and owing to plaintiff from defendant LeMans the amount of $22,523.95 principal, plus $1,460.07 interest through March 28, 1975 on the note referred to in paragraph 4 above. Said note accrues interest at the rate of $8.64 per day from and after March 28, 1975.

8. By their terms, all promissory notes described herein were to be payable to plaintiff at its principal office in the City of Lakewood, County of Jefferson, State of Colorado.

SECOND CLAIM FOR RELIEF

1. Plaintiff incorporates herein paragraphs 1 through 8 of its First Claim for Relief as though said paragraphs were set forth herein in full.

2. On or about September 9, 1974 defendant Mark Felsen ["Felsen"] executed his promissory note in favor of plaintiff in the amount of $6,501.50. Said note represented a renewal of an earlier note originally executed February 8, 1973 payable to plaintiff. A copy of said note is attached hereto as Exhibit 4. Said note is in default and defendant Felsen has failed and refused to honor the demand of plaintiff for payment in full of the principal and accrued interest thereon. Said note provides for recovery by plaintiff of its reasonable attorney's fees, costs, and expenses of retaking, holding, and disposing of collateral security therefor.

3. Defendant Felsen signed individually as a comaker, the promissory notes described in paragraphs 3, 4 and 5 of plaintiff's First Claim for Relief.

4. There is presently due and owing to plaintiff from Defendant Felsen the amount of $6,501.50 principal plus $574.22 interest through March 28, 1975 on the note referred to in paragraph 2 above. Said note accrues interest at the rate of $2.67 per day from and after March 28, 1975.

THIRD CLAIM FOR RELIEF

1. Plaintiff incorporates herein paragraphs 1 through 8 of its First Claim for Relief as though said paragraphs were set forth herein in full.

2. Plaintiff incorporates herein paragraphs 2 through 4 of its Second Claim for Relief as though said paragraphs were set forth herein in full.

3. On or about January 22, 1974 defendant G. Garvin Brown, III ["Brown"] executed in Lakewood, Colorado, his Continuing Guaranty guaranteeing repayment to plaintiff of any and all indebtedness of defendant LeMans and defendant Felsen up to a maximum amount of $350,000 principal, plus an additional amount over said $350,000 figure for interest, costs, attorneys' fees, and other expenses incurred in the enforcement of said Continuing Guaranty. Defendant Brown has failed and refused to honor the demand of plaintiff for payment in full of the principal and accrued interest thereon, and said Guaranty is in default. A copy of said Guaranty is attached hereto as Exhibit 5.

WHEREFORE, plaintiff Jefferson Bank & Trust prays for entry of judgment as follows:

1. Against defendants Felsen, Brown and LeMans, jointly and severally, in the amount of $291,988.28 plus interest from and after March 28, 1975 at the rate of $98.16 per day; and

2. In addition to the amount requested in paragraph 1 of this prayer, against defendants Felsen and Brown,

jointly and severally, in the amount of $7,075.72 plus interest from and after March 28, 1975 at the rate of $2.67 per day; and

3. Against defendants Felsen, Brown and LeMans, jointly and severally for plaintiff's costs, attorneys' fees, and other expenses incurred hereunder and for such other and further relief as may to the Court seem proper.

HOLLAND & HART

By RICHARD KOON
Richard M. Koon

By EDWARD M. GILES
Edward M. Giles

500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
Phone: 292-9200

Attorneys for Plaintiff

Address of Plaintiff:

7590 West Colfax Avenue
Lakewood, Colorado 80215

SECURED NOTE—SINGLE PAYMENT—(SIMPLE)

SECURITY AGREEMENT
AND
PROMISSORY NOTE

LE MANS MOTORS, INC.	2020 South Broadway Denver, Colorado 80210
Name	Mailing Address

Lakewood, Colorado May 13, 1974 Code_____ No. 05701

ON DEMAND, or if no Demand is made, than on or before

_____ $313,171.98
Due

I, we, or either of us, promise to pay to the order of JEFFERSON BANK & TRUST at its office in Lakewood, Jefferson County, Colorado. On Demand, 19__

the sum of

THREE HUNDRED THIRTEEN THOUSAND
ONE HUNDRED SEVENTY ONE 98/100
Dollars,

with interest at the rate of 13 per cent per year, and in the event of default in the payment of the principal and/or interest of this note, this note shall draw interest at the rate of twelve (12) per cent per year from the date of such default or from the date of maturity. Interest is payable monthly.

To secure the payment of the foregoing indebtedness, and any and all liability, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter arising (all hereinafter called "Obligations") of the undersigned to the holder, the undersigned (hereafter sometimes called "Debtor") grants to the holder (sometimes hereafter called "Secured Party") a security interest in all property and any all additions, accessions and substitution thereto or thereof of the undersigned of any kind or transferred now or at any time or times hereafter assigned, transferred or delivered to or left in or coming into possession, control or custody of bank, whether expressly as collateral security or for any other purpose, and in addition thereto the following:

EXHIBIT 1

Year	Make	MSO	Amount Financed	
~~1974~~	~~Lotus~~	~~1231R~~	~~6,565.00~~	*7-26-74*
1973	Ferrari	14631	19,000.00	
1972	Ferrari	04904	18,000.00	
1972	Ferrari	13771	1,500.00	
1973	Ferrari	14963	19,000.00	
1972	Lamborghini	10190	17,000.00	
~~1971~~	~~Lamborghini~~	~~8226~~ *6-19-74*	~~11,000.00~~	*6-19-74*
1973	Ferrari	15485	19,000.00	
1973	Ferrari	03316	11,500.00	
~~1974~~	~~Lotus~~	~~2883R~~	~~6,049.00~~	*6-3-74*
~~1973~~	~~Lotus~~	~~3103R~~	~~5,000.00~~	*8-14-74*
1974	Lotus	4204R	6,500.00	
~~1974~~	~~Lotus~~	~~4099R~~	~~6,665.00~~	*6-10-74*
~~1973~~	~~Lotus~~	~~3301R~~	~~6,000.00~~	*5-31-74*
~~1973~~	~~Lotus~~	~~3006R~~	~~5,385.00~~	*5-31-74*
~~1973~~	~~Lotus~~	~~3014R~~	~~5,507.98~~	*5-31-74*
1973	Ferrari Dino	03066	10,000.00	
1973	Ferrari Dino	03098	11,000.00	
~~1974~~	~~Lotus~~	~~4116R~~	~~6,700.00~~	*6-3-74*
~~1972~~	~~Lotus~~	~~0141K~~	~~4,800.00~~	*5-21-74*
1973	Ferrari	15747	17,000.00	
1973	Ferrari	16895	20,000.00	
~~1973~~	~~Ferrari Dino~~	~~03064~~	~~13,000.00~~	*9-16-74*
1973	Ferrari	14643	18,000.00	
1973	Ferrari	15359	21,000.00	(G. Garvin Brown)
1973	Ferrari	03970	14,000.00	(G. Garvin Brown)
1973	Ferrari	14911	19,000.00	
			313,171.98	

The Debtor agrees to deliver to the Secured Party additional security should the Secured Party deem itself insecure.

At the option of the Secured Party, all Obligations shall become immediately due and payable without notice or demand upon the occurrence of any of the following events of default: (a) failure of the Debtor, with or without demand or notice, to deliver additional security as above agreed; (b) default in the payment or performance of any liability or obligation of any Debtor, endorser or guarantor of any liability or obligation of any Debtor, to the holder; (c) failure to pay when due any premium on any life insurance

policy held as collateral herefor; (d) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against, any Debtor, endorser or guarantor hereof. Upon the occurrence of any such event of default, and at any time thereafter, the Secured Party shall have the remedies of a Secured Party under the Uniform Commercial Code. The requirement of reasonable notice of public or private sale shall be met if such notice is mailed, postage prepaid, to the Debtor at the address given below at least five days before the time of sale or disposition. Expenses of retaking, holding, preparing for sale, selling or the like shall include Secured Party's reasonable attorney fees and legal expenses.

The undersigned hereby authorize any attorney at law at any time after this obligation becomes due, to appear for us in any court of record in the State of Colorado or elsewhere, and waive the issuance and service of process and confess a judgment or judgments against the undersigned in favor of the holder of this note for the principal amount of this note, plus interest, together with the costs of any action brought thereon, including a reasonable attorney's fee (in no case less than ten per cent of the principal). Stay of execution is hereby waived and the exemption of personal property from levy and sale on any execution issued is also waived.

Any deposits or other sums at any time credited by or due from the holder to any maker, endorser or guarantor hereof and any securities or other property of any maker, endorser or guarantor hereof in the possession of the holder may at all times be held and treated as collateral security for the payment of this obligation. The holder may apply or set off such deposits or other sums against said liabilities at any time in case of makers, but only with respect to matured liabilities in the case of endorsers or guarantors.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. A waiver on any one occasion shall not be construed as a bar to or waiver of any such right and/or remedy on any future occasion.

Every maker, endorser and guarantor of this notes waives presentment for payment and notice of dishonor, assents to any extension or postponement of the time of payment or any other in-

dulgence and/or to the addition or release of any other party or person primarily or secondarily liable.

The undersigned will pay on demand all costs of collection and reasonable attorneys' fees, incurred or paid by the holder in enforcing this note on default.

LE MANS MOTORS, INC.

Signature

MARK FELSEN President

MARK FELSEN

Individually By:
Mark Felsen

By _____
Signature

President

FORM 393—66

EXHIBIT 1 (Cont.)

SECURED NOTE—SINGLE PAYMENT—(SIMPLE)

SECURITY AGREEMENT

AND

PROMISSORY NOTE

LE MANS MOTORS, INC.	2020 South Broadway, Denver, Colorado
Name	Mailing Address

Lakewood, Colorado June 17, 1974, ____ Code ____ No. 05719

ON DEMAND, or if no Demand is made, than on or before

on demand $36,404.75 Due

I, we, or either of us, promise to pay to the order of JEFFERSON BANK & TRUST at its office in Lakewood, Jefferson County, Colorado. demand 19____ the sum of

THIRTY SIX THOUSAND FOUR HUNDRED AND FOUR AND 75/100

Dollars,

with interest at the rate of 13 per cent per year, and in the event of default in the payment of the principal and/or interest of this note, this note shall draw interest at the rate of twelve (12) per cent per year from the date of such default or from the date of maturity. Interest is payable monthly.

To secure the payment of the foregoing indebtedness, and any and all liability, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter arising (all hereinafter called "Obligations") of the undersigned to the holder, the undersigned (hereafter sometimes called "Debtor") grants to the holder (sometimes hereafter called "Secured Party") a security interest in all property and any all additions, accessions and substitution thereto or thereof of the undersigned of any kind or transferred now or at any time or times hereafter assigned, transferred or delivered to or left in or coming into possession, control or custody of bank,

EXHIBIT 2

whether expressly as collateral security or for any other purpose, and in addition thereto the following:

~~1974 Ferrari~~	~~7952~~	~~14,847.30~~	*Pd 9-16-74*
1974 Ferrari	7738	14,847.30	
~~1974 Jeep~~	~~J1A177GP26360~~	~~6,710.15~~	*Pd 6-26-74*

The Debtor agrees to deliver to the Secured Party additional security should the Secured Party deem itself insecure.

At the option of the Secured Party, all Obligations shall become immediately due and payable without notice or demand upon the occurrence of any of the following events of default: (a) failure of the Debtor, with or without demand or notice, to deliver additional security as above agreed; (b) default in the payment or performance of any liability or obligation of any Debtor, endorser or guarantor of any liability or obligation of any Debtor, to the holder; (c) failure to pay when due any premium on any life insurance policy held as collateral herefor; (d) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against, any Debtor, endorser or guarantor hereof. Upon the occurrence of any such event of default, and at any time thereafter, the Secured Party shall have the remedies of a Secured Party under the Uniform Commercial Code. The requirement of reasonable notice of public or private sale shall be met if such notice is mailed, postage prepaid, to the Debtor at the address given below at least five days before the time of sale or disposition. Expenses of retaking, holding, preparing for sale, selling or the like shall include Secured Party's reasonable attorney fees and legal expenses.

The undersigned hereby authorize any attorney at law at any time after this obligation becomes due, to appear for us in any court of record in the State of Colorado or elsewhere, and waive the issuance and service of process and confess a judgment or judgments against the undersigned in favor of the holder of this note for the principal amount of this note, plus interest, together with the costs of any action brought thereon, including a reasonable attorney's fee (in no case less than ten per cent of the principal). Stay of execution is hereby waived and the exemption of personal property from levy and sale on any execution issued is also waived.

EXHIBIT 2 (Cont.)

Any deposits or other sums at any time credited by or due from the holder to any maker, endorser or guarantor hereof and any securities or other property of any maker, endorser or guarantor hereof in the possession of the holder may at all times be held and treated as collateral security for the payment of this obligation. The holder may apply or set off such deposits or other sums against said liabilities at any time in case of makers, but only with respect to matured liabilities in the case of endorsers or guarantors.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. A waiver on any one occasion shall not be construed as a bar to or waiver of any such right and/or remedy on any future occasion.

Every maker, endorser and guarantor of this notes waives presentment for payment and notice of dishonor, assents to any extension or postponement of the time of payment or any other indulgence and/or to the addition or release of any other party or person primarily or secondarily liable.

The undersigned will pay on demand all costs of collection and reasonable attorneys' fees, incurred or paid by the holder in enforcing this note on default.

LE MANS MOTORS, INC.
MARK FELSEN

Signature

MARK FELSEN

By _____
Signature

Personally

FORM 393—66

EXHIBIT 2 (Cont.)

DFG - 1s

PROMISSORY NOTE

(DIRECT LOAN — INTEREST TO FOLLOW — DISCLOSURES INCLUDED)

Customer Number	Note Number	Face Amount	ANNUAL PERCENTAGE RATE:	Note Date (Mo.Da.Yr.)	Maturity Date (Mo.Da.Yr.)
00-62952	002	$ 22,523.95	14.00	10-11-74	11-11-74

29 — US

SECURITY
Right of Set-off and, in addition,

☒ None

☐ _____

☐ _____
as further described in Security Agreement of even date.

☐ Security Agreement secures future or other debt and covers after-acquired property.

Maker: Name, Address, Zip Code

LE MANS MOTORS INC.
2020 South Broadway
Denver, Colorado 80210

Business Phone

Home Phone

The captions above and below and the names, dates, amounts and other information therein, are defined terms and are hereby incorporated in the note provisions below.

Proceeds		$ 22,523.95
Other Charges:		
Insurance	$ _____	
Official Fees	$ _____	
	$ _____	
Total Other Charges		$ _____
Amount Financed		$ 22,523.95
Finance Charges:		
Interest	$ 267.82	
	$ _____	
FINANCE CHARGE (Total)		$ 267.82
Total of Payments		$ 22,791.77

Maker promises to pay to the order of

JEFFERSON BANK & TRUST
P. O. Box 15008

at its banking house in

Lakewood, Colorado 80215

the Amount Financed with interest on the unpaid balance thereof from the Note Date until paid at the **ANNUAL PERCENTAGE RATE.** Principal and interest shall be payable as follows:

at maturity

Purpose of Loan Business
(Personal, Family, Household, Agricultural, or Business)

In the event of prepayment in full, if the earned Finance Charge at the time of prepayment in less than $15.00, the holder of this note ("holder") may collect said amount (inclusive of earned Finance Charge) as a minimum charge.

EXHIBIT 3

At the option of the holder, the unpaid balance of this note and all other obligations of Maker to the holder, direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand if (a) any payment required by this note is not made when due, or (b) a default or event of default occurs under any loan or security agreement or other instrument executed as security for or in connection with this note, or (c) the holder at any time in good faith believes that the prospect of any payment required by this note is impaired, whether or not such belief is caused by any act or failure to act of any Maker or of any endorser, guarantor or accommodation party of or on this note (hereafter collectively referred to as "any other signer").

Maker and any other signer waive presentment, notice of dishonor and protest and assent to any extension of time with respect to any payment due under this note, to any substitution or release of collateral and to the addition or release of any party. No waiver of any payment or other right under this note shall operate as a waiver of any other payment or right, including right of offset. If the holder enforces this note upon default, Maker or any other signer shall pay, or reimburse the holder for, (a) reasonable expenses incurred in realizing on an Security therefor and (b) if referred to an attorney not a salaried employee of the holder, reasonable attorney's fees not in excess of 15% of the unpaid debt after default or, if allowed by the Colorado Uniform Consumer Credit Code (UCCC), such additional fees as may be directed by the Court.

This note (a) is secured by the Security indicated above, if any, and (b) shall be construed under and governed by the laws of Colorado. If there is more than one Maker, all of the provisions of this note shall apply to each and any of them.

By signing this promissory note, Maker also acknowledges receipt of a copy.

Maker's Signature: LE MANS MOTORS, INC.

MARK FELSEN PRES
Mark Felsen, President

MARK FELSEN
Mark Felsen, Individually

EXHIBIT 3 (Cont.)

Property insurance, if written in connection with this loan, may be obtained by Maker through any person of his choice. Credit Life and Disability Insurance is not required. No charge is made for insurance and no insurance is provided unless the borrower signs the appropriate statement below:

☐ Credit Life Insurance alone costing $_____ for the term of the credit.

☐ Credit Life and Disability Insurance costing $_____ for the term of the credit.

☐

I desire the insurance checked above:

_____ (Date) _____ (Signature)

EXHIBIT 3 (Cont.)

DFG - 1s

PROMISSORY NOTE

(DIRECT LOAN — INTEREST TO FOLLOW — DISCLOSURES INCLUDED)

Customer Number	Note Number	Face Amount	ANNUAL PERCENTAGE RATE	Note Date (Mo.Da.Yr.)	Maturity Date (Mo.Da.Yr.)
00-43192	001	$ 6,501.50	15.00	9-9-74	12-9-74

008 — US

SECURITY
Right of Set-off and, in addition,
☒ None
☐ _____
☐ _____
as further described in Security Agreement of even date.
☐ Security Agreement secures future or other debt and covers after-acquired property.

Maker: Name, Address, Zip Code
FELSEN, Mark
2020 South Broadway
Denver, Colorado 80210

Business Phone _____
Home Phone

The captions above and below and the names, dates, amounts and other information therein, are defined terms and are hereby incorporated in the note provisions below.

Proceeds		$ 6,501.50
Other Charges:		
Insurance	$ _____	
Official Fees	$ _____	
	$ _____	
Total Other Charges		$ ~~6,501.50~~
Amount Financed		$ 6,501.50
Finance Charges:		
Interest	$ 243.14	
	$ _____	
FINANCE CHARGE (Total)		$ 243.14
Total of Payments		$ 6,744.64

Maker promises to pay to the order of **JEFFERSON BANK & TRUST**
P. O. Box 15008
at its banking house in
Lakewood, Colorado 80215
the Amount Financed with interest on the unpaid balance thereof from the Note Date until paid at the **ANNUAL PERCENTAGE RATE**. Principal and interest shall be payable as follows.
at maturity

Purpose of Loan Personal
(Personal, Family, Household, Agricultural, or Business)

In the event of prepayment in full, if the earned Finance Charge at the time of prepayment in less than $15.00, the holder of this note ("holder") may collect said amount (inclusive of earned Finance Charge) as a minimum charge.

EXHIBIT 4

At the option of the holder, the unpaid balance of this note and all other obligations of Maker to the holder, direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand if (a) any payment required by this note is not made when due, or (b) a default or event of default occurs under any loan or security agreement or other instrument executed as security for or in connection with this note, or (c) the holder at any time in good faith believes that the prospect of any payment required by this note is impaired, whether or not such belief is caused by any act or failure to act of any Maker or of any endorser, guarantor or accommodation party of or on this note (hereafter collectively referred to as "any other signer").

Maker and any other signer waive presentment, notice of dishonor and protest and assent to any extension of time with respect to any payment due under this note, to any substitution or release of collateral and to the addition or release of any party. No waiver of any payment or other right under this note shall operate as a waiver of any other payment or right, including right of offset. If the holder enforces this note upon default, Maker or any other signer shall pay, or reimburse the holder for, (a) reasonable expenses incurred in realizing on an Security therefor and (b) if referred to an attorney not a salaried employee of the holder, reasonable attorney's fees not in excess of 15% of the unpaid debt after default or, if allowed by the Colorado Uniform Consumer Credit Code (UCCC), such additional fees as may be directed by the Court.

This note (a) is secured by the Security indicated above, if any, and (b) shall be construed under and governed by the laws of Colorado. If there is more than one Maker, all of the provisions of this note shall apply to each and any of them.

By signing this promissory note, Maker also acknowledges receipt of a copy.

Maker's Signature:

MARK FELSEN
Mark Felsen

EXHIBIT 4 (Cont.)

Property insurance, if written in connection with this loan, may be obtained by Maker through any person of his choice. Credit Life and Disability Insurance is not required. No charge is made for insurance and no insurance is provided unless the borrower signs the appropriate statement below:

☐ Credit Life Insurance alone costing $ —0— for the term of the credit.

☐ Credit Life and Disability Insurance costing $ —0— for the term of the credit.

☐

I desire the insurance checked above:

(Date) (Signature)

EXHIBIT 4 (Cont.)

CONTINUING GUARANTY

TO JEFFERSON BANK & TRUST

(1) For valuable consideration, the undersigned (hereinafter called Guarantors) jointly and severally unconditionally guarantee and promise to pay to JEFFERSON BANK & TRUST (hereinafter called Bank), or order, on demand, in lawful money of the United States, any and all indebtedness of LEMANS MOTORS & MARK FELSEN (hereinafter called Borrowers) to Bank. The word "indebtedness" is used herein in its most comprehensive sense and includes any and all advances, debts, obligations and liabilities of Borrowers or any one or more of them, heretofore, now, or hereafter made, incurred or created, whether voluntary or involuntary and however arising, whether due or not due, absolute or contingent, liquidated or unliquidated, determined or undetermined, and whether Borrowers may be liable individually or jointly with others, or whether such indebtedness may be or hereafter become otherwise unenforceable.

(2) The liability of Guarantors shall not exceed at any one time the sum of THREE HUNDRED FIFTY THOUSAND and no/100 Dollars ($350,000.00) for principal, together with all interest upon the indebtedness or upon such part thereof as shall not exceed the foregoing limitation. Notwithstanding the foregoing. Bank may permit the indebtedness of Borrowers to exceed Guarantors' liability. This is a continuing guaranty relating to any indebtedness, including that arising under successive transactions which shall either continue the indebtedness or from time to time renew it after it has been satisfied. This guaranty shall not apply to any indebtedness created after actual receipt by Bank of written notice of its revocation as to future transactions. Any payment by Guarantors shall not reduce their maximum obligation hereunder, unless written notice to that effect be actually received by Bank at or prior to the time of such payment.

(3) The obligations hereunder are joint and several, and independent of the obligations of Borrowers, and a separate action or actions may be brought and prosecuted against Guarantors whether action is brought against Borrowers or whether Borrowers be joined in any such action or actions.

(4) Guarantors authorize Bank, without notice or demand and without affecting their liability hereunder, from time to time to (a) renew, compromise, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including increase or decrease of the rate of interest thereon; (b) take and hold security for the payment of this guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof as Bank in its discretion may determine; and (d) release or substitute any one or more of the endorsers or guarantors. Bank may without notice assign this guaranty in whole or in part.

EXHIBIT 5

(5) Guarantors waive any right to require Bank to (a) proceed against Borrowers; (b) proceed against or exhaust any security held from Borrowers; or (c) pursue any other remedy in Bank's power whatsoever. Guarantors waive any defense arising by reason of any disability or other defense of Borrowers or by reason of the cessation from any cause whatsoever of the liability of Borrowers. Until all indebtedness of Borrowers to Bank shall have been paid in full, even though such indebtedness is in excess of Guarantors' liability hereunder. Guarantors shall have no right of subrogation and waive any right to enforce any remedy which Bank now has or may hereafter have against Borrowers and waive any benefit of, and any right to participate in any security now or hereafter held by Bank. Guarantors waive all presentments, demands for performance, notices of non-performance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty and of the existence, creation or incurring of new or additional indebtedness.

(6) In addition to all liens upon, and rights of setoff against the moneys, securities or other property of Guarantors given to Bank by law, Bank shall have a lien upon and a right of setoff against all moneys, securities and other property of Guarantors now or hereafter in the possession of or on deposit with Bank, whether held in general or special account or deposit, or for safekeeping or otherwise; and every such lien and right of setoff may be exercised without demand upon notice to Guarantors. No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Bank, or by any neglect to exercise such right of setoff or to enforce such lien or by any delay in so doing, and every right of setoff and lien shall continue in full force and effect until such right of setoff or lien is specifically waived or released by an instrument in writing executed by Bank.

(7) Any indebtedness of Borrowers now or hereafter held by Guarantors is hereby subordinated to the indebtedness of Borrowers to Bank; and such indebtedness of Borrowers to Guarantors if Bank re request shall be collected, enforced and received by Guarantors as trustees for Bank and be paid over to Bank on account of the indebtedness of Borrowers to Bank but without reducing or affecting in any manner the liability of Guarantors under the other provisions of this guaranty.

(8) Where any one or more of Borrowers are corporations or partnerships, it is not necessary for Bank to inquire into the powers of Borrowers or the officers, directors, partners or agents acting or purporting to act on their behalf, and any indebtedness made

EXHIBIT 5 (Cont.)

or created in reliance upon the professed exercise of such powers shall be guaranteed hereunder.

(9) Guarantors agree to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Bank in the enforcement of this Guaranty.

(10) Any married woman who signs this guaranty hereby expressly agrees that recourse may be had against her separate property for all her obligations under this guaranty.

(11) In all cases where there is but a single Borrower or a single Guarantor, then all words used herein in the plural shall be deemed to have been used in the singular where the context and construction so require; and when there is more than one Borrower named herein, or when this guaranty is executed by more than one Guarantor, the word "Borrowers" and the word "Guarantors" respectively shall mean all and any one or more of them.

IN WITNESS WHEREOF the undersigned Guarantors have executed this guaranty this 22nd day of January, 1974.

G. GARVIN BROWN III

State of Colorado
County of Jefferson } ss.

The foregoing instrument was acknowledged before me this 22nd day of January, 1974, by Garvin Brown III

Witness my hand official seal.

LEAPHA SHACHIL

Notary Public

My commission expires Sept 2, 1974

Form 246

EXHIBIT 5 (Cont.)

DISTRICT COURT, STATE OF COLORADO
FELSEN'S ANSWER TO STATE COURT COMPLAINT

[Caption omitted in printing]

COME NOW the defendants, LeMans Motors, Inc. and Mark Felsen, by their attorneys, Keller & Dunievitz, and in answer to the Complaint allege as follows:

ANSWER TO FIRST CLAIM

These defendants admit paragraphs 1, 2 and 8 and deny paragraphs 3, 4, 5, 6 and 7.

ANSWER TO SECOND CLAIM

These defendants incorporate herein their answers to the first claim as applicable and deny paragraphs 2, 3 and 4.

ANSWER TO THIRD CLAIM

These defendants incorporate herein their answers to the first and second claims as applicable and admits paragraph 3.

WHEREFORE, having fully answered, these defendants pray that the Complaint be dismissed as against them and that they recover their costs.

KELLER & DUNIEVITZ

By ALEX STEPHEN KELLER

Attorneys for Defendants LeMans & Felsen
316 Symes Building
Denver, CO 80202 255-3601

Address of LeMans & Felsen:
2020 So. Broadway
Denver, CO 80210

[Certificate of service omitted in printing]

DISTRICT COURT, STATE OF COLORADO
BROWN'S ANSWER TO STATE COURT COMPLAINT

[Caption omitted in printing]

COMES NOW Defendant G. Garvin Brown, III, by and through his attorneys, Dawson, Nagel, Sherman & Howard, and in answer to Plaintiff's Complaint admits, denies, and alleges as follows:

FIRST CLAIM FOR RELIEF

1. In answer to paragraph 1 of Plaintiff's Complaint, this Defendant admits the allegations therein.

2. In answer to paragraph 2 of the Plaintiff's Complaint, this Defendant admits that he is a resident of the State of California but is without sufficient information to form a belief as to the truthfulness of the remaining allegations of paragraph 2 and therefore denies the same.

3. This Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in paragraphs 3, 4, 5, 6, 7, and 8 of Plaintiff's First Claim for Relief and therefore denies the same.

SECOND CLAIM FOR RELIEF

1. This Defendant incorporates by reference his answers to paragraphs 1 through 8 of Plaintiff's First Claim for Relief as though said answers were set forth herein in full.

2. This Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in paragraphs 2, 3, and 4 of Plaintiff's Second Claim for Relief and therefore denies the same.

THIRD CLAIM FOR RELIEF

1. This Defendant incorporates herein by reference his answers to paragraphs 1 through 8 of Plaintiff's First Claim for Relief as though said answers were set forth herein in full.

2. This Defendant incorporates herein his answers to paragraphs 2 through 4 of Plaintiff's Second Claim for Relief as though said answers were set forth in full.

3. In answer to paragraph 3 of Plaintiff's Third Claim for Relief, this Defendant admits that his signature appears on Exhibit 5 to Plaintiff's Complaint. This Defendant further admits that he has paid no sums to the Plaintiff but denies that any sums are due and owing. This Defendant denies each and every remaining allegation contained in paragraph 3 of Plaintiff's Third Claim for Relief.

AFFIRMATIVE DEFENSES

As separate and affirmative defenses to the claim of Jefferson Bank & Trust, the defendant G. Garvin Brown, III alleges:

1. This Defendant received no adequate consideration whatsoever from Plaintiff or any other source for the execution of the guaranty upon which he is sued herein.

2. The terms of the guaranty upon which this Defendant is sued are grossly unjust, overreaching, unreasonable and unconscionable insofar as they purport to apply to him.

3. This Defendant was induced to sign such guaranty by misrepresentations and non-disclosures of material facts by the other defendants hereto, which misrepresentations and non-disclosures were known to or under the circumstances should have been known to Plaintiff at the time it accepted the purported guaranty.

4. At the time the Plaintiff requested and this Defendant delivered his purported guaranty, the Plaintiff possessed information concerning the business and financial condition of LeMans Motors, Inc. and Mark Felsen,

which was not known to this Defendant and which was material to the risk which this Defendant understood he would be undertaking as a guarantor to Plaintiff. Plaintiff knew or should have known under the circumstances that such information was unknown to this Defendant and Plaintiff failed to disclose such information to this Defendant.

5. This Defendant was induced to sign such guaranty by misrepresentations and non-disclosures of material facts by the Plaintiff and its agents or employees.

6. The Plaintiff, through its agents and employees represented to this Defendant that care was being taken in the preservation of collateral held by the Bank as security for the underlying obligation and this Defendant relied upon said representations and upon said preservation of the collateral. In fact, said representations were not true and the Plaintiff allowed the collateral to be wasted and dissipated.

7. Plaintiff has not cared for the collateral or performed its obligations in this transaction in a commercially reasonable manner and this Defendant is entitled to a setoff for any amounts of collateral or other assets which were otherwise available in satisfaction of the obligation but were allowed to be wasted or dissipated by the Plaintiff contrary to reasonable standards or to the representations of the Plaintiff to this Defendant.

8. This Defendant is informed and believes that a lengthy period of time elapsed from the time that the Bank's rights as alleged in its Complaint first accrued, but that nevertheless, the Plaintiff failed and refused to enforce its rights as alleged therein. As a proximate result thereof, and in reliance upon the Plaintiff's forbearance as alleged, this Defendant was prejudiced in his ability to seek and obtain adequate indemnification pursuant to existing rights of indemnification which this Defendant

could otherwise have immediately enforced. As a proximate result thereof, the Plaintiff has waived its rights to recover from this Defendant on the guaranty attached to the Complaint.

WHEREFORE, this Defendant, having fully answered Plaintiff's Complaint, prays that the same be dismissed and that the Plaintiff take nothing by way of its Complaint, for costs and for such other and further relief as this Court may deem appropriate.

DAWSON, NAGEL, SHERMAN & HOWARD

H. Clay Whitlow
Craig A. Christensen

By _____

Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, CO 80202
893-2900
Attorneys for Defendant
G. Garvin Brown, III

[Certificate of service omitted in printing]

DISTRICT COURT, STATE OF COLORADO
BROWN'S AMENDED ANSWER TO STATE COURT COMPLAINT

[Caption omitted in printing]

COMES NOW Defendant G. Garvin Brown, III, by and through his attorneys, Dawson, Nagel, Sherman & Howard, and submits the following amended answer and cross-claim:

PRELIMINARY

Defendant G. Garvin Brown, III hereby incorporates by reference his previous Answer as if fully set forth herein.

FIRST CROSS-CLAIM

1. Any liability which this Defendant purportedly has to Plaintiff arises out of a guaranty executed by this Defendant on behalf of LeMans Motors, Inc. and Mark Felsen.

2. If judgment is had against this Defendant by Plaintiff, then this Defendant is entitled to be indemnified by LeMans Motors, Inc. and Mark Felsen for the full amount of said judgment, plus the Defendant's costs and expenses.

WHEREFORE, this Defendant demands judgment against LeMans Motors, Inc. and Mark Felsen for indemnification in the amount of any judgment entered in the favor of Plaintiff against this Defendant, for interest, costs, attorney's fees, and such other and further relief as this Court may deem appropriate.

DAWSON, NAGEL, SHERMAN & HOWARD
CRAIG A. CHRISTENSEN

By _____

Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, CO 80202 (893-2900)
Attorneys for Defendant G. Garvin Brown, III

[Certificate of service omitted in printing]

DISTRICT COURT, STATE OF COLORADO
FELSEN'S REPLY TO BROWN'S CROSS-CLAIM

[Caption omitted in printing]

COME NOW the defendants, LeMans Motors, Inc. and Mark Felsen, by their attorneys, and deny the allegations of the First Cross-Claim filed by defendant G. Garvin Brown, III.

WHEREFORE, having fully answered, these defendants pray that the First Cross-Claim be dismissed as against them and that they recover their costs.

KELLER & DUNIEVITZ

ALEX STEPHEN KELLER

By _____

Attorneys for Defendants, LeMans and Felsen
316 Symes Building
Denver, CO 80202
255-3601

[Certificate of service omitted in printing]

* * *

[Attachment entitled Pre-trial Statement of G. Garvin Brown, III filed in State Court omitted in printing]

* * *

DISTRICT COURT, STATE OF COLORADO

STATE COURT STIPULATION

[Caption omitted in printing]

Plaintiff Jefferson Bank & Trust, and defendants LeMans Motors, Inc., Mark Felsen, and G. Garvin Brown, III, stipulate and agree that judgment may enter as follows:

1. On plaintiff's complaint, in favor of plaintiff Jefferson Bank & Trust and against defendants LeMans Motors, Inc., Mark Felsen and G. Garvin Brown, III, jointly and severally, in the amount of $298,000, which sum includes principal, interest, expenses, reasonable attorneys fees, and costs, plus interest at the legal rate from and after December 31, 1975.

2. On the crossclaim of defendant G. Garvin Brown, III, in favor of defendant G. Garvin Brown, III, and against defendants LeMans Motors, Inc. and Mark Felsen, in the amount of $298,000, plus interest at the legal rate from and after December 31, 1975.

HOLLAND & HART

Edward M. Giles

By _____
Edward M. Giles
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
292-9200
Attorneys for Jefferson
Bank & Trust

KELLER & DUNIEVITZ

Alex S. Keller

By _____
Alex S. Keller
316 Symes Building
Denver, Colorado 80202
255-3601
Attorneys for LeMans and Felsen

DAWSON, NAGEL, SHERMAN & HOWARD

Craig A. Christensen

By _____
Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202
893-2900
Attorneys for G. Garvin Brown, III

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO
Civil Action No. 46727
Division 3

JEFFERSON BANK & TRUST, a state bank chartered under the laws of the State of Colorado,
Plaintiff,

vs.

LEMANS MOTORS, INC., a Colorado corporation,

MARK FELSEN, and
G. GARVIN BROWN, III,
Defendants.

JUDGMENT

THIS MATTER having come before the Court upon the stipulation of all parties, and the Court having read the stipulation and fully considered the matter, it is

ORDERED, ADJUDGED AND DECREED that judgment enter as follows:

1. On plaintiff's complaint, in favor of plaintiff Jefferson Bank & Trust and against defendants LeMans Motors, Inc., Mark Felsen and G. Garvin Brown, III, jointly and severally, in the amount of $298,000, which sum includes principal, interest, expenses, reasonable attorneys fees, and costs, plus interest at the legal rate from and after December 31, 1975.

2. On the crossclaim of defendant G. Garvin Brown, III, in favor of defendant G. Garvin Brown, III and against defendants LeMans Motors, Inc. and Mark Felsen, in the

amount of $298,000, plus interest at the legal rate from and after December 31, 1975.

DATED: December ...., 1975.

/s/ WINSTON W. WOLVINGTON

District Judge

APPROVED:

HOLLAND & HART

By Edward M. Giles

Edward M. Giles
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
292-9200
Attorneys for Plaintiff Jefferson Bank & Trust

KELLER & DUNIEVITZ

By Alex S. Keller

Alex S. Keller
316 Symes Building
Denver, Colorado 80202
255-3601
Attorneys for Defendants LeMans Motors, Inc. and Mark Felsen

DAWSON, NAGEL, SHERMAN & HOWARD

By Craig A. Christensen

Craig A. Christensen
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202
893-2900
Attorneys for Defendant G. Garvin Brown, III

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

In re MARK PAUL FELSEN, Bankrupt. G. GARVIN BROWN, III, Plaintiff, vs. MARK PAUL FELSEN, Bankrupt, Defendant.	BANKRUPTCY NO. 76 B 56

FINDINGS, CONCLUSIONS AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Filed December 16, 1976

Appearances: Craig A. Christensen, Attorney for the Plaintiff

Alex Stephen Keller, Attorney for the Defendant.

This matter arises out of a complaint filed by the plaintiff (Brown) seeking to have a debt owed by the Bankrupt defendant (Felsen) declared non-dischargeable. The complaint filed in this Court is in three Claims for Relief, the first of which avers that Felsen induced Brown into guaranteeing a loan to Felsen and Felsen's business, LeMans Motors (LeMans), by the Jefferson Bank and Trust (Bank). It is further averred that the inducement which procured Brown's guaranty was based on false representations. Finally, it is set forth that Brown's guaranty was called upon by the bank, and that demand ultimately resulted in the bank's obtaining a judgment against Brown

in the amount of $298,000.00. The first claim for relief is concluded upon the assertion that Felsen's fraudulent inducement and its subsequent results amount to the obtaining of money or property by false pretenses or false representations within the meaning of §17a(2) of the Bankruptcy Act.

The second claim for relief avers that the indebtedness to Jefferson Bank and Trust and the indebtedness arising out of the bank's judgment against Brown, and a judgment Brown obtained against Felsen for indemnification were debts created by the willful and malicious conversion of property of another by Felsen. The basis for the claim is an averment that Felsen sold automobiles upon which the Bank had a security interest, and which security interest was subrogated to Brown.

The third claim for relief states that Felsen's auto sales previously complained of, made while Felsen was president of LeMans, created a liability by fraud, embezzlement, misappropriation or defalcation while acting as an officer within the meaning of § 17a(4) of the Bankruptcy Act. On the basis of the three claims for relief, Brown sought judgment declaring that the liabilities of Felsen to Brown arising out of Brown's guaranty of the Bank's loan are not dischargeable.

Felsen answered the complaint by denying every averment except that relating to the entry of the judgment by the Bank against Brown. In addition, three affirmative defenses were presented, only one of which is pertinent. In his third affirmative defense, Felsen stated:

> (T)he Civil Action in the District Court of the State of Colorado, City and County of Denver, (sic) referred to in the Complaint, has been finally concluded and determined. The same is res adjudicata (sic) and no finding of fraud was contained therein.

Subsequent to the filing of the answer, Brown filed a motion seeking to have the Court strike the three affirmative defenses.

For reasons not pertinent to the issues now under consideration, the motion to strike was denied by the Court, and the matter was set for pre-trial conference. The Court ordered that counsel appear at the pre-trial conference prepared to discuss the applicability of *Raley v. Nicholas,* 510 F. 2d 160 (10th Cir., 1975).

After the pre-trial conference, counsel for both parties filed a stipulated record of the state court proceedings which contained the pertinent pleadings and the state court judgment. Thereafter, Felsen filed the instant motion for summary judgment relying upon the state court record and the holding in *Raley v. Nicholas,* supra. After oral argument, it appears to the Court that there are no genuine issues as to any material facts, and that this matter should be decided upon the motion for summary judgment.

Applicability of *Raley* and its result to the case at issue appears inescapable. While the plaintiff insists that there are factual distinctions present in this case which make *Raley* inapposite, I cannot agree. Moreover, as I view the situation, I have no choice but to enter judgment in favor of the defendant declaring the debt in question dischargeable.

Let us first examine the law. No matter what the rule may be in other jurisdictions, in this Circuit the guidelines to be followed in cases of this nature are set forth immutably in *Raley*. As the judges of this Court have unanimously interpreted those guidelines since pronounced, when a debt has been reduced to judgment in a state court, and when the record of that state court proceeding is presented to a Bankruptcy Court, the Bankruptcy Court is bound to apply the results of the state court judgment to a complaint to determine the dischargeability of the debt founded upon the

state court judgment. Not only is the Bankruptcy Court bound by the state court judgment, when the state court record is complete, the Bankruptcy Court is also specifically interdicted by *Raley* from considering any evidence outside that record. Thus, this case must turn on that record stipulated by the parties.

Examination of the state court record indicates that the action was originally commenced by the Bank against Brown and Felsen as codefendants. The original complaint was based entirely on the non-payment of certain notes, including the note guaranteed by Brown which gives rise to the instant action. Both defendants answered denying the debt, and Brown raised the affirmative defense that he was induced to sign the guaranty by "misrepresentations and non-disclosures of material facts by the other defendants hereto". Brown then filed a cross-claim in which he asserted the theory that if he were held liable on the note to the Bank he was entitled to indemnification from Felsen. After a period of time, the parties in the state court entered into a stipulation for the entry of judgment.

By the terms of the stipulation, Brown conceded liability to the Bank upon the complaint and Felsen conceded liability to Brown upon the cross claim. Apparently without further hearing, the state court entered judgment against both parties in accordance with the stipulation. Nowhere in the stipulation or in the judgment is it indicated that the judgment entered against Felsen was based upon fraud or anything other than upon Felsen's stipulation that judgment be entered against him. Moreover, examination of the entire state court record indicates to me that the liability resulting in the judgment was not based upon fraud.

The only reference to fraud found in the state court record is the previously quoted affirmative defense. Notwithstanding, the cold record fails to disclose the state

court's reliance upon the defense as the basis for the judgment. Since *Raley* will not permit me to go outside the record, I have no choice but to conclude that the liability sought to be discharged is not of the sort made nondischargeable by any provisions of § 17 of the Bankruptcy Act. Accordingly, it is

ORDERED that the motion for summary judgment be and the same is hereby granted, and it is

FURTHER ORDERED that the debt owed by the Bankrupt, Mark Paul Felsen, to G. Garvin Brown, III, arising out of a judgment entered in the District Court in and for the County of Jefferson, State of Colorado, be and the same is hereby determined to be dischargeable.

DATED: December 16, 1976

BY THE COURT:

John P. Moore

Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

G. GARVIN BROWN, III, Plaintiff, vs. MARK PAUL FELSEN, Bankrupt.	Civil Action No. 76-B-56 ORDER Filed October 19, 1977

THIS MATTER comes on this day for hearing on Plaintiff's Petition for Review of a judgment by the Bankruptcy Court determining that the debt from the Bankrupt to the Plaintiff is dischargeable. The parties waived the presence of a court reporter.

The Court having heard the arguments of counsel and being familiar with *In re Nicholas,* 510 F.2d 160 (Tenth Circuit), and the Court having provided counsel with the case of *Teutsch v Vickers,* No. 76-2175, decided August 19, 1977 (Tenth Circuit), and the Court now being fully advised,

DOTH HEREBY AFFIRM IN ALL RESPECTS the judgment and Order of the Bankruptcy Court herein.

DATED at Denver, Colorado, this 19th day of October, 1977.

Fred M. Winner

Fred M. Winner
United States District Judge

NOT FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-2035

In the Matter of:

MARK PAUL FELSEN
f/d/b/a/LeMans Motors, Inc.

G. GARVIN BROWN, III,
Plaintiff-Appellant,

vs.

MARK PAUL FELSEN, Bankrupt,
Defendant-Appellee.

Appeal from the United States District Court for the District of Colorado (D.C. No. 76-B-56)

Filed April 14, 1978

Submitted: March 6, 1978
on the briefs

Craig A. Christensen and Deanna E. Hickman of Dawson, Nagel, Sherman and Howard, Denver, Colorado, for Appellant.

Alex Stephen Keller of Keller, Dunievitz and Johnson, Denver, Colorado, for Appellee.

Before LEWIS, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

G. Garvin Brown, III (Brown) appeals from a final order of the District Court affirming the decision of a referee in bankruptcy discharging the debts of Mark Paul Felsen, Bankrupt (Felsen).

The debt owed Brown by Felsen was evidenced by a judgment rendered in a state court proceeding. In January, 1974, Brown executed a guaranty in favor of the Jefferson Bank and Trust (Bank), guaranteeing payment of all indebtedness of Felsen and his company, Le Mans Motors, to a limit of $350,000. Felsen and Le Mans Motors subsequently defaulted on obligations to Bank and Bank instituted an action in state court against Felsen and Le Mans, as debtors, and Brown, as guarantor.

In answer to Bank's complaint, Brown alleged that he had executed the guaranty because he had been "induced to sign such guaranty by misrepresentation and non-disclosures of material facts by defendants hereto." [R., Vol. I, at 26.] Subsequently, Brown filed an amended answer and a cross-claim wherein he incorporated, by reference, the matters alleged in his original answer and, by cross-claim, prayed for reimbursement of any sums he might be liable for on the guaranty. The state action was not tried inasmuch as the Bank, Felsen and Brown entered into a settlement agreement, which was incorporated into a judgment. The parties' stipulation (agreement) provided for judgment in favor of Bank and against Felsen, Brown and Le Mans Motors, jointly and severally, in the amount due and owing Bank and judgment in favor Brown against Felsen and Le Mans for the same amount. No evidentiary record was made of the state court proceedings because the basis of the judgment was the parties' agreement.

In January, 1976, Felsen filed a petition for voluntary bankruptcy. Brown sought to have the judgment rendered in his favor against Felsen in the state court declared non-dischargeable, on the ground that he had become Felsen's guarantor only by reason of Felsen's fraudulent inducement and misrepresentations. Brown contended that application of Section 17(a) (2) of the Bankruptcy Act, 11 U.S.C. 35, prevented discharge. Felsen asserted, in response, that since there had been no finding of fraud in th state court proceed-

ings, the judgment was *res judicata*. A stipulated record of the state court proceedings, including the pleadings and judgment, was filed in the bankruptcy proceedings.

The referee allowed the discharge, holding that there had been no showing of fraud in the aforesaid state court proceeding:

> As the judges of this Court have unanimously interpreted those guidelines since pronounced, when a debt has been reduced to judgment in a state court, and the record of that state court proceeding is presented to a Bankruptcy Court, the Bankruptcy Court is bound to apply the results of the state court judgment to a complaint to determine the dischargeability of the debt founded upon the state court judgment. Not only is the Bankruptcy Court bound by the state court judgment when the state court record is complete, the Bankruptcy Court is also specifically interdicted by *Raley* from considering any evidence outside that record. Thus, this case must turn on that record stipulated by the parties.
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> [R., Vol. I, at 46.]

The referee in bankruptcy rendered his decision on the basis of the stipulated record which revealed no fraudulent activity on the part of Felsen. On appeal to the District Court, the dischargeability of the judgment was affirmed.

On appeal, Brown contends that the referee and the District Court erred in allowing discharge of the judgment debt simply because the judgment and the record from which it arose do not indicate facially that the judgment was based on fraud.

Judgments rendered against a bankrupt are not classified or distinguished from other provable debts and they will be discharged unless they fall within the special exceptions delineated in Section 17(a) of the Bankruptcy Act.

8 Remington on Bankruptcy 3302, at 1522. Section 17 does prevent a bankrupt's debt from being discharged if the debt was obtained as a result of false pretenses or false representations.

I.

Brown argues that the state court record contains allegations and evidence of fraud sufficient to raise the issue of fraud relating to the debt evidenced by the judgment. He urges that this court require that the referee undertake a *de novo* hearing on this issue. We decline to do so.

In light of the parties' stipulation, it was not necessary for the state court to inquire whether the guaranty had been fraudulently induced. There is no record in existence regarding the alleged fraud. The sole basis on which Brown can now rely in his assertion that fraud motivated him to execute the guaranty is the self-serving matter contained in his answer to the Bank's complaint. This, and this alone, constitutes the sole reference to any possible fraud in the dealings between Brown and Felsen. There was no mention of any fraudulent inducement problem in the stipulation entered into between the parties. The stipulation was, of course, embodied in the judgment entered in the state court.

Brown is bound by the state court judgment in that a consent decree has the same force and effect as any other judgment and is considered to be a final adjudication on the merits. Securities and Exchange Commission v. Thermodynamics, Inc., 319 F. Supp. 1380 (D. Colo. 1970), aff'd 464 F. 2d 457 (10th Cir. 1972), *cert. denied,* 410 U.S. 927 (1973). Once it is shown that the parties did, in fact, consent to rendition of a judgment, such a judgment is deemed to be valid and binding. Hot Springs Coal Co. v. Miller, 107 F.2d 677 (10th Cir. 1939). In the instant case there is nothing in the stipulation indicating that the Brown-Felsen guaranty was induced by fraudulent representations. Parties

involved in a consent judgment waive their rights to litigate the issues involved in the case as posed by the pleadings. United States v. Armour and Co., 402 U.S. 673 (1971). Thus, we hold that Brown cannot now raise the issue of fraud. Furthermore, Brown's allegation of fraudulent misrepresentations contained in his answer in the state court proceeding does not adequately raise the issue of fraud for bankruptcy consideration. In addition, his casual answer does not meet the requirements of Rule 9, Colorado Rules of Civil Procedure, that all averments of fraud and the circumstances constituting fraud must be stated with particullarity.

There is nothing in this record which indicates that the stipulation reached in settling the litigation in the state court proceeding between Bank, Brown and Felsen was in any manner induced by fraud. Thus, we must reject Brown's contention that the pleadings raise an issue of fraud. In like manner, we hold that Brown is not entitled to a *de novo* hearing on the alleged fraud issue.

II.

Brown contends that even if fraud was not adequately raised in the state court proceedings, the question of dischargeability is within the sole province of the Bankruptcy Court and that, accordingly, the state court judgment cannot be held to be *res judicata* on this issue.

The determination as to whether a debt is the result of a fraudulent transaction is, of course, within the ambit of the Bankruptcy Act. However, in the instance where a debt has been reduced to judgment, a referee in bankruptcy generally will not go beyond the record of the proceedings in which the judgment was rendered in order to ascertain if discharge will lie:

> Where, however, a liability has been prosecuted to judgment, the record is usually held decisive as to the

> character of the claim upon which the judgment is founded, and cannot be affected by the introduction of parol evidence except in the case of ambiguity. In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the record in the action must show that fraud and deceit were the 'gist and gravamen' of the action.
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> Collier on Bankruptcy, Vol. IA, s 17.16 (4), at 1643-6.

This court has rendered two opinions dealing with the discharge of a judgment creditor in a bankruptcy proceeding. They hold that the record of the proceeding in which a judgment was rendered prior to bankruptcy proceedings will generally control in a subsequent bankruptcy proceeding.

In In re Nicholas 510 F.2d 160 (10th Cir. 1975), *cert. denied*, 421 U.S. 1012 (1975), a creditor sued to prevent discharge of a default judgment awarded him in a state court proceeding. The creditor claimed that discharge should not lie, inasmuch as the original liability upon which the judgment was based had been obtained through fraud and false pretenses. In support of his contention the creditor filed an affidavit which contained alleged information that the debtor had, in essence, "cheated" the creditor. This court held that where an examination of the entire record and the judgment does not evidence that the liability was predicated on fraud, the referee in bankruptcy must refuse to permit the judgment creditor to introduce extrinsic evidence to the effect that the liability was, in reality, based on fraud. We there observed:

> The record of the proceedings in the state court clearly indicated that the liability was one for damages arising out of breach of contract and not fraud. Under such circumstances, there was no need to resort to extrinsic evidence.
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> 510 F.2d, at 164.

We again articulated the rule that a state court record and judgment will control in a subsequent bankruptcy action in In re Vickers, an unpublished opinion (No. 76-2175, decided August 19, 1977). We there observed:

> The rule in this circuit is that when a debt sought to be discharged has been reduced to judgment in state court, the nature of the obligation is to be determined on the basis of the record and the judgment in that action. Absent ambiguity as to the nature of the claim, no resort may be had to extrinsic evidence.
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> Ibid, at 6.

WE AFFIRM.